UNITED STATED DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001

Date: 01/27/97

CASE NO. 95-INA-121

In the Matter of:

LA TABLITA, INC.
Employer

on behalf of

MARIO DI LEO
Alien

Before: Holmes, Neusner and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. The certification of aliens for permanent employment in the United States is governed by §212 of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision refer to Title 20.

We base our decision on the record upon which the CO denied certification and the Employer's request for review as contained in the appeal file (AF) and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

The Employer, giving an address in Princeton, New Jersey, filed an Application for Alien Labor Certification (ETA 750A) to permit it to employ the Alien permanently as a Restaurant Manager. The application was accompanied by a Statement of Qualifications of Alien (ETA

750B) in which it was reported that the Alien had been employed by the Employer as a Restaurant Manager at Princeton, New Jersey from January 1991 to August 1992 and as a Manager Trainee at La Tablita restaurants in Bridgewater, New Jersey and New York, New York from January 1988 to January 1991. The Employer noted in the ETA 750A that it required any U.S. applicant for the position to have similar experience, i.e., two years as a Restaurant Manager or three years as a Mexican Restaurant Trainee.

The CO issued a Notice of Findings (NOF) in which she proposed to deny certification, *inter alia*, on the basis that the application does not comply with the provisions of §656.21(b)(5) of the regulations because the Employer had not shown that his requirements for the job opportunity are the minimum necessary for the performance of the job and that it had not hired or it is not feasible to hire workers with less training and experience. The CO noted in this regard that it appeared that the Alien had gained his experience at other La Tablita Restaurants controlled by the same owners. The Employer was instructed to confirm that there is not overlapping of ownership and control among the three restaurants or to document that it is not now feasible to train a U.S. worker by indicating the following.

a. how many restaurant Managers were employed at the time the alien was trained.

b. how many Restaurant Managers are now employed (besides the alien);

c. who trained the alien;

d. change in total work force and annual volume of business from the time alien was hired and trained until present; and,

e. why a company that has expanded considerably since alien was trained has not proportionately developed the ability to train now, as is customary with growth and development.

The Employer filed a rebuttal to the NOF in which it answered the above stated issue as follows:

> All "la Tablita" outlets are under different corporations, but essentially the same owners. At the time that [the Alien] was hired in 1988 we were in the process of expansion, [sic] we had four outlets in New York and New Jersey. By 1990, we had expanded to 10 outlets in a four state area. At that time we also had between 50 and 70 employees at any given time and a monthly payroll of approximately $68,000. We thus had time and a felt need to train individuals as managers. Partly

> because of the recession and of what we now realize was an overexpansion, we have now downsized from ten to three outlets. Thus, while it was possible and seemed advisable for us to have had 'management trainees' in 1988-91, we now do not, at this time, have the capability to train new managers.

In a Final Determination, dated July 15, 1994, the CO denied certification solely on the basis that the Employer's rebuttal documentation did "not adequately address those issues required for demonstrating the infeasibleness of training someone else at this time as required by the [NOF]." The CO noted also that the income of the Employer's Princeton outlet had more than doubled since 1992[1] and held that "there is sufficient 'growth' incomewise to allow for training now as is customary with growth and development."

The Employer requested an administrative judicial review of the denial of certification and the record was forwarded to the Board for such purpose.

DISCUSSION

Section 656.21(b)(5) of the regulations provides:

> The employer shall **document** that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training and experience than that required by the employer's job offer.

(Emphasis added.)

An employer has a "heavy" burden of establishing why it is not now feasible to offer the same treatment to U.S. applicants as it has to the alien. *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991). A bare assertion of infeasibleness to train is inadequate to establish that an employer cannot now hire a worker with less experience and provide training. *MMMATS, Inc.*, 87-INA-540 (Nov. 24, 1987)(*en banc*). Consequently, an employer's assertion that its business has declined to the point where it is now financially unable to train a new worker must be documented. *Jackson & Tull Engineers*, 87-INA-547 (Nov. 24, 1987). Downsizing of an employer's operation does not, *per se* demonstrate an infeasibility to train a U.S. Worker. *Citibank, N.A.*, 94-INA-122 (Mar. 14, 1995).

The Employer responded to the NOF by contending that it can no longer train a manager because of its downsizing. However, it offered none of the documentation requested by the CO

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[1] This information was based on the Employer's rebuttal to another discrepancy noted in the NOF, which is no longer an issue.

nor has it otherwise offered evidence to show how the downsizing has effected its ability to train a U.S. worker.[2] Accordingly, we agree with the CO that the Employer has not met its burden of documenting that it is now infeasible for it to offer the same opportunity to a U.S. worker as it has to the Alien.

ORDER

The Certifying Officer's DENIAL of alien labor certification in this case is AFFIRMED.

Entered at the direction of the Board by:

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TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a part petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Certification Appeals
800 K Street, N. W., Suite 400
Washington, D. C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

[2] It appears that the closing of some of the Employer's locations should have made other managers, whose positions had been eliminated, available to fill the position here involved.